the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with ''the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'.'' It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character:

''Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'' Equivalent behavior on the part of a group is designated ''routine practice of an organization'' in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

''Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.''

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate ''habits'' is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin v. United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious ''habits'' of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

''It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.'' *Id*. at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste v. New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed 1475, 10 Vand.L.Rev. 447 (1957); McCormick §162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code §1105.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that ''because the world gets wiser as it gets older, therefore it was foolish before.'' *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore §283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code §1151; Kansas Code of Civil Procedure §60–451; New Jersey Evidence Rule 51.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The amendment to Rule 407 makes two changes in the rule. First, the words ''an injury or harm allegedly caused by'' were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the ''event'' causing ''injury or harm'' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp.*, 856 F.2d 17, 21–22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove ''a defect in a product or its design, or that a warning or instruction should have accompanied a product.'' This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1522 (1st Cir. 1991); *In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc.*, 995 F.2d 343 (2d Cir. 1993); *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir.